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No. 81-2250

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

Iva May Harvey, et al.,

Petitioners

v.

United States of America,

Respondent.

REPLY BRIEF

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The Government advances six arguments in support of its contention that review is not warranted. Each will be discussed seriatim.

1. It urges this case "is governed by federal law" because it "concerns title to lands that have become attached to lands which have been in federal ownership ever since they became part of this Nation." Brief for the United States in Opposition ("Govt. Brief"), pg. 9 (emphasis added).

This, of course, does not meet the test articulated in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 670 (1979). To date federal property law has only been applied to ocean-front land, California ex rel. State Lands Commission v. United States, ___ U.S. ___, 102 S.Ct. 2432, 2438 (1982), and Hughes v. Washington, 389 U.S. 290, 293 (1967), and to land in which "the Government has never parted with title and its interest in the property continues. . . ." Wilson v. Omaha Indian Tribe, supra at 652.

To be sure, this Court may in the future decide to apply federal law in other situations where there is "an overriding federal interest", id. at 669, or where there is "some other principle of federal law requiring state law to be displaced", Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977), but clearly this is not such a case. Hence, federal law does not govern the resolution

of this controversy. Ownership must therefore be determined under California law. Arkansas v. Tennessee, 246 U.S. 158, 175 (1918); see Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra at 362, and Joy v. St. Louis, 201 U.S. 332, 343 (1906).

2. The Government also argues that if State law must be used "Arizona law, rather than California law, should be borrowed as the applicable federal rule" of decision. Govt. Brief, pg. 11. This argument is based upon Nebraska v. Iowa, 406 U.S. 117 (1972), and Wilson v. Omana Indian Tribe, supra, where Nebraska law was applied to land ceded by that State to Iowa. But Nebraska law was followed to prevent Iowa and the Tribe from invoking legal principles which, if followed, would have defeated the otherwise valid claims of the pre-compact owners. Wilson v. Omaha Indian Tribe, supra at 676 - 78. But, as discussed below, there is no

difference between the California and Arizona doctrines of accretion. 1/ There is therefore no cogent reason for adopting Arizona law as the federal rule of decision. 2/

Moreover, the compact between Nebraska and Iowa is substantially different from the Arizona - California compact. See Petition for Writ of Certiorari [etc.], pp. 29 - 30. Under the agreement between Arizona and California the law of the ceding State is not to be applied except in those rare instances where failure to do so would "preju-

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1/ Arizona apparently does allow a presumption of accretion (see State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699, 702 (1971)), but the effect of that presumption would disappear with the evidence of avulsion adduced by Petitioners at trial. More importantly, it would not affect the parties' proof of what caused the accretion, the issue before this Court.

2/ Indeed, much like Tyson v. State of Iowa, 283 F.2d 802, 811 (8th Cir. 1960), quoted with approval in Nebraska v. Iowa, supra at 126: "Iowa law controls since all of the land in controversy is located in Iowa, and . . . the Nebraska law of accretion did not operate to create riparian

dice the titles, rights or claims of any person . . . to any of the lands" ceded. 1963 Ariz. Sess. Laws, ch. 77, §5; 1963 Calif. Stat., ch. 859, §4. Here no claim of prejudice has, or can, be made.

Finally, one of the express purposes of the Arizona - California compact was to eliminate confusion and difficulty in "the enforcement and administration of the law of the two states and of the United States." Pub. Law 89-531, Art. I, 80 Stat. 340 (1966). But applying Arizona law would certainly add to, rather than eliminate, the confusion and difficulty of such concern when the compact was ratified.

3. The Government's third contention is based upon the alleged "absence of any controlling [Arizona] state court decision" and a presumption that Arizona therefore

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(continued)

rights within the territorial limits of Iowa."

follows the general common law rule by disregarding the cause of accretion. Govt. Brief, pg. 12. This "absence" and presumption are squarely at odds with the one Arizona Supreme Court case that has addressed this issue, State v. Bonelli Cattle Co., supra at 469, 489 P.2d at 703. There it was held that "[w]here a river shifts to a new location as a result of unnatural forces" no change in title ensues. Id. Indeed, the Government's argument is patterned largely after the dissent in that case, a position which the majority of the Arizona Supreme Court must therefore have considered and rejected. Id. at 470, 489 P.2d at 703 - 04.

Furthermore, the majority opinion did not, as the Government suggests, dispose of that dispute solely on the ground "that the channel had been uncovered "rapidly and perceptibly.'" Govt. Brief, pg. 12. Rather, the court concluded:

> "The plaintiff argues what it calls the 'artificial accretion' theory, urging that an abut-

> ting owner is entitled to the accretion caused by artificial conditions over which he has no control. An accretion is a 'gradual and imperceptible accumulation of land by natural causes,' Black's Law Dictionary. In the instant case, the exposed portion of the channel was not brought into existence gradually and imperceptibly. The exposure was man-made and the channel was uncovered rapidly and perceptibly." Id. at 468, 489 P.2d at 703.

After reconsideration of this decision the Arizona Supreme Court stated that "artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to" the man-made changes in the river channel. 108 Ariz. 258, 260, 495 P.2d 1312, 1314 (1972).

4. Clearly, then, the Government misconstrues the law of accretion in Arizona. But it does much more than misconstrue the law of California in representing that "the California courts follow the usual common law rules in disputes concerning lands along

non-tidal rivers and streams." Govt. Brief, pg. 14. Indeed, though the Government elsewhere cites and relies on California ex rel. State Lands Commission v. United States, supra, it fails to mention that there this Court recognized the importance of causation under the California law of accretion. ___ U.S. at ___, 102 S.Ct. at 2435. Suffice it to say, there are several California appellate decisions which state very clearly that an upland owner will not benefit by accretions caused by artificial or unnatural causes. State v. Superior Court of Placer County, 29 Cal.3d 240, 248, 625 P.2d 256, 261, 172 Cal. Rptr. 713, 718 (1981), City of Long Beach v. Mansell, 3 Cal.3d 462, 469, 476 P.2d 423, 428, 91 Cal. Rptr. 23, 28 (1970), and City of Los Angeles v. Anderson, 206 Cal. 662, 667, 275 P. 789, 791 (1929).

5. Nor will the Government's assertion that "there is good reason to believe" the Submerged Lands Act of 1953 compels ap-

plication of federal law withstand scrutiny. Govt. Brief, pg. 15. California ex rel. State Lands Commission v. United States, supra, held that Section 5(a) of that Act precluded adopting a State standard only after finding that federal law governed. Obviously when, as here, State law governs in the first instance the Court is not free to select a rule of decision and must apply the State's law. Arkansas v. Tennessee, supra at 175. Thus, in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., supra, this Court rejected the contention that the Submerged Lands Act was a "basis for a colorable claim of federal right" and stated that:

> "[T]he Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, nor did it alter state property law regarding riparian ownership. The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundries as against any claim of the United States Government. As merely a declaration

> of the States pre-existing rights in riverbeds, nothing in the Act in any way mandates, or even indicates, that federal common law should be used to resolve ownership of lands which, by the very terms of the Act, reside in the States." 429 U.S. at 371 - 72, n. 4.

Moreover, the provision relied upon by the Government reserves to the United States only land, "together with all accretions thereto," that it "lawfully and expressly" acquires from a State or person. 43 U.S.C. §1313(a). Here the disputed parcel is accretion to land never owned by a State or private person. See Govt. Brief, pg. 9. A fortiori, the Government did not expressly acquire this tract from a State or person.

The next clause deals expressly with the Government's upland, to which Harvey's Fishing Hole attached, and it makes no mention of accretion. That clause reserves to the United States "all lands expressly retained by or ceded to the United States when

the State entered the Union. . . ." Id. There is absolutely no dispute that title to the upland in this case was "retained" by the United States. Govt. Brief, pg. 2. Accordingly, accretion to this retained land is not subject to the federal law exception noted by this Court in California ex rel. State Lands Commission v. United States, supra.

6. The Government's final argument relates to the estoppel issue. It contends, as it did in the court of appeals, that the juries' answers to Special Interrogatories Nos. 6 and 7 were supported by substantial evidence and therefore must not be disturbed. Govt. Brief, pg. 16. Those answers were to the effect that Petitioners were not ignorant of the Government's claim to this land and did not detrimentally rely on the Government's conduct. Petitioners vehemently disagree but unfortunately cannot, at this juncture, present a detailed analysis of the evidence which supports their position.

See Petition for Writ of Certiorari [etc.], pp. 58 - 62. Such an analysis will be made if they are permitted to brief this case, however.

Suffice it to say that the juries' answers are patently illogical. The following demonstrates why. When the Harveys purchased this parcel in 1952 they received clear and marketable title. It was not until the late 1950's that the Government expert who first suspected this was accretion land formed that opinion. But he never told any of the Petitioners (though he had many opportunities to do so). Not until 1960 was this suspicion confirmed by survey, but by then the Harveys had cleared, subdivided and commenced selling lots in the subdivision. The Government intentionally delayed notifying Petitioners of its claim until 1967. In the meantime, and with the actual knowledge of the same Government expert and of the Government employees responsible for administering federal land in this area, most of

the 96 lots were sold, some were resold, and many homes and other valuable improvements were constructed.

The only logical inferences to be drawn from these facts are that Petitioners were indeed ignorant of the Government's claim and did in fact rely upon its conduct to their detriment. 3/ The jury findings to the contrary are not supported by substantial evidence and must be set aside.

In conclusion, none of the arguments advanced by the Government support its assertion that review is unwarranted. For the reasons set forth in the Petition, there is a compelling need for issuance of a writ of certiorari, now the last remedy available for the prevention of a grave miscarriage of justice.

3/ The Government, like the jury, must believe that Petitioners were incredibly naive. Otherwise they certainly would not have purchased and improved this land knowing it was owned by the United States. 196 occupants were named as defendants and it defies logic that all were that naive.

Respectfully submitted.

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August 27, 1982

CERTIFICATE OF SERVICE

I, Floyd H. Shebley, one of the attorneys for Petitioners and a member of the Bar of this Court, certify that on the 27th of August, 1982, the foregoing Reply Brief was duly served upon all of the other parties hereto by depositing a true and complete copy thereof in a United States post office in Portland, Oregon, with first class postage fully prepaid, addressed as follows:

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